

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 467 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.DAVE and

MR.JUSTICE R.R.JAIN

- =====
1. Whether Reporters of Local Papers may be allowed
to see the judgements? No
 2. To be referred to the Reporter or not? No
 3. Whether Their Lordships wish to see the fair copy
of the judgement? No
 4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No
 5. Whether it is to be circulated to the Civil Judge?
No
-

ZAMIRSHAH ZULFIKARSHAH DIWAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 467 of 1993
MR BN RAVAL for Petitioners
MR.S.R.DIVETIA,LD.PUBLIC PROSECUTOR for Respondent No. 1
-

CORAM : MR.JUSTICE S.D.DAVE and

MR.JUSTICE R.R.JAIN

Date of decision: 20/12/96

ORAL JUDGEMENT

Per: S.D. Dave, J :-

The Appellants before us came to be convicted for

the offence punishable under section 20 (b) (ii) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (NDPS Act, 1985), by the Ld. Addl. Sessions Judge, Kheda at Nadiad, in Sessions Case No. 25 of 1991, under the orders dated March 24, 1992. They have been sentenced to the R.I. for ten years and to a fine of Rs.1,00,000-00, in default to the further R.I. for six months. The above said judgment of conviction and sentence has been brought in challenge by the appellants before us. At the time of the admission of the appeal, the bail for the appellant no.1 came to be refused, but the appellant no.2 Jenabbibi was continued on the same bail but with fresh bonds.

Before we go to the facts of the case of the prosecution, we must say that the investigation has been conducted and completed in a cavalier fashion. The very prosecution witness PSI Menpura was probably ignorant of all the necessary provisions of NDPS Act, 1985.

It appears to be the case of the prosecution that, PSI Menpura who was attached as the Task Force PSI, Anand, at the relevant time had received certain information on July 26, 1990, to the effect that, the accused persons possess and deal in narcotic substance, namely "Charas". He therefore in the company of certain police constables, including Woman police constable Benaben and two panchas had made the raid and the charas came to be seized. The appellants accused were put on trial before the Ld. Addl. Sessions Judge, after the Report of the FSL was obtained. On the appreciation of the evidence, which according to us is absolutely poor, upon which no conviction could have been based, the appellants accused came to be convicted under the orders referred to above.

Ld. counsel Mr. Bhupendra N. Rawal, who appears for the appellants places in forefront a solitary contention that the mandatory provisions contained in section 50 of the NDPS Act 1985 have not been complied with and that, the evidence would go to show that, there was a clear breach of these provisions. With a view to appreciate the above said contention, the fact situation shall have to be observed. The panch who came to be examined before the Court below has not supported the case of the prosecution. But much would depend upon the evidence of PSI Menpura PW-3 Exhibit-15. He never says that the mandatory requirements of section 50 were complied with by him. Not only this, but during the cross examination he has come out with a candid confession that, he has not complied with the provisions

contained under section 20 of the NDPS Act,1985. No other police officials say that, in fact the said provisions were complied with. Factually therefore the contention that the provisions contained in section 20 of the NDPS Act 1985 have not been complied with shall have to be accepted.

When once such a contention is accepted on the basis of the evidence brought before the Court below, the consequences following from the same are not unknown. Learned counsel Mr. Rawal places reliance upon the Supreme Court decision in State of Punjab, Petitioner Vs. Balbir Singh, Respondent, A I R 1994, S.C. pg.1872. This decision while examining the provisions contained in section 50 of the NDPS Act 1985 makes it abundantly clear that, the said provisions are mandatory in nature. The same principle is reiterated by Supreme Court in Ali Mustaffa Abdul Rahman Moosa, Appellant v. State of Kerala, Respondent, A I R 1995 S.C. pg. 244. In this decision also, the Supreme Court makes it abundantly clear that, the compliance with the provisions contained in section 50 of NDPS Act 1985 is mandatory. It is pointed out that, the police officer must give the person alleged to be possessing contraband an option to be searched in presence of a Gazetted Officer or a Magistrate. This decision therefore would go to show that, the provisions contained in section 50 of NDPS Act 1985 are mandatory in nature.

Accepting the contention coming from learned counsel Mr. B.R. Rawal for the appellants, we shall have to say that the present appeal requires to be allowed and the appellants accused require to be acquitted. We accordingly allow the present appeal and set aside the judgment of conviction and sentence rendered by the Court below. The appellants accused are hereby ordered to be acquitted of the offences punishable under section 20 (b) (ii) of NDPS Act,1985. Appellant accused no.1 is behind the bars and therefore he shall be set at liberty forthwith, if not required in any other criminal case or proceedings. The appellant no.2 Jenabbibi is on bail. Her bail bonds shall stand cancelled.
